United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1100

No. 74-1100

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JOEL BREAKSTONE

Plaintiff-Appellant

vs.

JOHNSON STATE COLLEGE, et al.

Defendants-Appellees

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

BRIEF OF APPELLEES

RICHARD E. DAVIS ASSOCIATES, INC.
30 WASHINGTON STREET
BARRE, VT 05641

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harmful nature of the explosive device, when such responsive information contains observations about the owner and principal fabricator of the explosive device?

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Did the trial court in fact fail to consider all of the relevant and material issues relating to malice as it affected the claim of privilege on behalf of the defendant Barnett?

V

Was there ample support in the testimony and evidence to support the Court's finding that the publisher of the libel was not motivated by malice?

STATEMENT OF THE CASE

During the summer of 1970, the plaintiff was employed as a general counselor at a boys summer camp in New Hampshire. During the course of the camping season, the plaintiff accumulated as many as eight black powder rocket propellant charges which had been used and were used in connection with launching of model rocket ships. When the plaintiff returned to Johnson State College in the fall of 1970, he brought this explosive material with him and stored it in his desk in a room which he shared with Mr. Lawrence, his roommate.

Early in December of 1970, the plaintiff deposited the explosive powder into a large cylindrical object, and after the powder had been packed it was thoroughly sealed on both ends and a fuse which the plaintiff obtained from Mr. Hawkins was placed in one end. Plaintiff has always claimed to be the owner of the device, and the evidence is clear that it was the plaintiff who initiated the assembly and packing routine involving the explosive material. When an attempt to detonate the device proved unsuccessful, and the explosive device was then replaced in a desk drawer in the room.

A few days later, through a series of student conversations and conversations with a dormitory adviser, Mrs. Smith, Dean Monticello was notified of the whereabouts of the explosive device. A search of the room revealed the device and Dean Monticello confiscated it. There is some question as to the state of awareness of the plaintiff at the time that his room was searched but shortly after the search and retrieval of the explosive device, the plaintiff went to the dorm counselor's room and demanded that the device be returned to him. All of this occurred on December 11, 1970.

On the following Monday, December 14, 1970, law enforcement officials and the State's Attorney's office were notified by Dean Monticello of the device. Thereafter, an investigation and interviews were conducted by the Department of Public Safety, as well as by certain federal law enforcement officers. In addition to Dean Monticello, the resident advisors, Mr. Leene and Mr. Daum, were interviewed as well as Mr. Foote who was the president of the student council, along with Mr. Hawkins and the plaintiff. The plaintiff was the only witness who insisted on being interviewed with someone present - in that case, Dean Monticello. It is apparent from the testimony introduced at the trial, that the plaintiff was not at all completely truthful in giving his statement to the police and federal law enforcement officers and particularly denied having access or receiving a fuse for a device during its assembly. The plaintiff later admitted on cross-examination that he had previously obtained a fuse despite what he had told the police to the contrary.

Following the investigation, State Police made arrangements for the device to be tested at the State Police Laboratory to determine its characteristics, etc. On the same day that the investigations began, (about December 14, 1970) defendant Craig advised the plaintiff that if the report which he expected to receive from the State Police should indicate that the device was potentially harmful to people or property, that the plaintiff would be dismissed from

College forthwith. This was prior to any conversation or correspondence with or from defendant Barnett.

Subsequent to this (approximately five days later) at the beginning of the Christmas recess, the plaintiff conceivably, in consideration of the conversation with the defendant Craig, obtained permanent employment at the Mt. Mansfield Ski Area at the rate of $60 per week plus room, board and a free ski pass. At the end of the Christmas recess, the plaintiff was allowed to conditionally return to College with the understanding that he would be suspended if the report on the explosive nature of the device demonstrated that it was potentially harmful to people or property.

On or about February 11, 1971, the plaintiff was so advised by defendant Monticello and/or Defendant Craig that the lab report indicated the explosive device was potentially dangerous and the plaintiff was as per defendant Craig's earlier indication to him immediately suspended from the college.

From December 11 until February 11, there had been frequent, if not daily conversations, between the plaintiff and the defendants Craig and Monticello concerning the entire matter.

Subsequent to February of 1971, the plaintiff was prosecuted by the State's Attorney's office for possession of fire works at which time the State's Attorney attempted to enter a plea of not guilty by reason of insanity and attempted by recommendation of the Court to obtain psychiatric or psychological counseling for the plaintiff.

Because of his concern for the well-being of the community at large (including the Johnson College community) and of the plaintiff individually, defendant Barnett set forth in his several letters to president Craig certain observations and remarks pointing out the State's Attorney's opinion and impression as to the psychological stability of the plaintiff based on

information at the disposal of the State's Attorney including but not limited to the complete investigation conducted by State and Federal law enforcement officers. Defendant Craig did indicate sometime prior to February 11, 1971, that the letters he had received thus far from the defendant Barnett were not completely responsive to his request for information concerning the device and the potentially harmful nature of it in general. Subsequent to this brief conversation (which was the first and only time the two defendants had met) and after additional conversations with the State Police lab the letters of February 11 were forwarded.

Defendant Barnett was at all times very concerned about the atmosphere on the Johnson College campus, particularly as it was influenced or affected by the plaintiff after the bomb incident and because of other incidents involving the plaintiff at the campus which occurred the previous semesters. Although the State's Attorney had only about two years of actual legal practice - mostly related to the conveyancing field, he was actively involved in drug rehabilitation programs in the area and had given lectures and participated in seminars at both Johnson State College and elsewhere in an effort to understand and assist students who were troubled by drug related problems.

He was extremely conscious of the function of the State's Attorney to take proper and appropriate action to prevent situations from becoming more potentially hazardous and dangerous with a view to insuring and protecting the health, safety and welfare of the people in his county.

The plaintiff was eventually reinstated at Johnson State College, after some preliminary Federal Court hearings, and hearings by the all College Court of Johnson State College. Plaintiff was expected to matriculate in June of 1974 and at the time of the trial in this case was a student in good standing.

PROCEEDINGS BELOW

Following his expulsion, the plaintiff instituted suit under Section 1983 of Title 42 alleging conspiracy in connection with his expulsion. The complaint alleged conspiracy to deprive the plaintiff his civil rights by such expulsion without due process.

Prior to trial of the case, the plaintiff moved to amend to include an allegation of libel as to the defendant Barnett, and the defendant Barnett denied and asserted some affirmative defenses at that time. In April of 1973, the District Court took jurisdiction of the libel claim and the case was tried over a three day period from April 11 to April 19, 1973. On September 12, 1973, the Court entered its findings of fact, opinion and order denying all relief to the plaintiff and it is that opinion and order and the findings of fact and conclusions of law made by the Court that the plaintiff herein appeals from.

ARGUMENT

I

The District Court did not abuse its discretion in holding under F. R. Civ. P. 15 (b) that the issue of privilege was tried by consent of the parties, dispite the fact that the defendant formally failed to plead it as an affirmative defense - in the alternative, in accord with Rule 8.

A

It is conceded that privilege, either qualified or absolute, is in the nature of an affirmative defense.

B

However, to maintain that the Court committed plain error in holding that the issue of privilege was tried by consent of the parties under Rule 15 (b) neglects not only the role of the discretion of the Court, but the issues raised in the case and the better reasoned law on the subject.

The issue of libel was raised by the plaintiff very late in the proceedings, then only pendant to its principal claim and main thrust relating to the alleged conspiracy between the defendants and the resulting adverse affect as alleged on the constitutional rights of the plaintiff. It is clear, that the early pleadings and the concern of counsel for both the plaintiff and all of the defendants was primarily oriented toward the issue of "immunity" in its broadest and most general sense. That is not to say in the least, that the issue of privilege is not therein framed or contained, but rather that the principal thrust of the plaintiff's case related to those areas where immunity could be called as a defense - with the exception of the factor of libel which was orally denied, and to which some general defenses were asserted.

The principal purpose of Rule 15 (b) is to promote the objective of deciding cases on their merits, and surely Judge Coffrin's allowance of the defense of privilege is consistent with this primary objective (See Wright

and Miller, Federal Practice and Procedure, Vol. 6 Page 454, 1971). It is clear, that a general denial will serve as ample foundation for the defense of privilege in the libel action. (See Washington-Annapolis Hotel Co. v. Riddle 171 F. 2d 732 (D.C.Cir. 1948), and Flowers v. Zayre Corp. 286 F. Supp. 122, U.S.D.C.-Dist. S.C. 1968)

Counsel for the defendant Barnett orally, and as indicated earlier, generally denied and affirmatively defended on the grounds of "immunity" and an additional ground which is unclear from the transcript (See Tr. 9). Clearly, immunity, when phrased in that manner and taken in the light of the general argument, is clear enough to include the similar aspects of privilege and immunity (as will be indicated later) and in fact the defendant Barnett would argue that privilege is nothing more than a form of immunity held by the person against the normal course or operations of the law. It is too clear to require citation, that immunity in terms of libel and slander, is merely an exemption from liability in this case made available because of performance of a type of public duty and interest.

The direction of argument of the defendant Barnett with respect to privilege will be found in an examination of the evidence brought out in the course of examination by Barnett's counsel as it relates to the role and function of Barnett in his office as State's Attorney.

The requests to find submitted by the defendant Barnett, particularly those relating to the defendant's feelings of duty and thence a responsibility to the general public and the people at Johnson State College, as the State's Attorney for Lamoille County bear out the existance during the trial of the issue privilege, separated as they are from the normal issues involved in the resolution of the problems relating to judicial or quasi-judicial immunity in its narrowest sense. (See particularly Findings Number 33 and 34)

The plaintiff cannot now be heard to argue that he had no notice (particularly implied notice) and that he therefore did not impliedly at least

consent to the treatment of the privilege issue as if it had been raised in the pleadings. Arguably, the issues relating to absolute privilege, and those relating to immunity are somewhat cross-pollinated. However, in general terms such a privilege is provided for by the nature of a public officer's duty. It, (Barnett in this case) requires that he be "immune" from tort liability with respect to the furtherance of those functions, particularly when engaged in furtherance of the effective functioning of government. The occasion and the office afford the test whether an allegedly slanderous or libelous statement by a public officer will be determined to be either an absolute or a conditional or even a qualified privilege. (See 50 Am. Jur. 2d Libel and Slander §220). The key to the invocation of the defense of privilege must be viewed in terms of the common welfare, safety and convenience of society - as viewed through the responsibilities of the office of State's Attorney. (See 50 Am. Jur. 2d Libel and Slander §196).

As previously argued, where the existence of the issue of privilege - or the facts that would support it, is clear certainly privilege is then in issue if even by general denial on the part of the defendant. Facts in our case clearly demonstrate issue of privilege existed with reference to a statement by the defendant Barnett which concerned matters as to which he had a bona fide duty or interest (the welfare and safety of students and other people in the community), was made in good faith in the performance of that duty or the protection of the interests of concern to his office, and to a person having a corresponding duty or interest in relation to the same subject matter (the other defendant Craig).

It will be clearly seen from the transcript, that the witnesses dealing with all of the issues involved were called by the plaintiff, and that during the course of, what by statute amounted to cross-examination of the defendant parties, the basic facts necessary to frame the issue of privilege were initially explored by the plaintiff's own counsel, and further explored

on direct examination and cross-examination of the defendant parties by all defense counsel. It was during this aspect of the testimony that the issue of malice - a key issue to the plaintiff to contradict the defense of privilege, was explored.

In response to the attempt on the part of the plaintiff's counsel to indicate malice it is clear that the defendant Barnett did what he felt he had to do to make his very real concerns about the safety of not only the plaintiff, but other people in the area, known to the school authorities. (See Tr. 177 and 178 et sec)

It is interesting to note, that the plaintiff seemingly in recognition of the basic principals of law dealing with the issue of privilege did not attempt to introduce any evidence of abuse, and although the plaintiff argues his brief that he would have, it is clear that with respect to the protection afforded by the doctrine of absolute privilege as found by the Court, that the issue relating to abuse of the privilege does not even arise. (See 50 Am. Jur. 2d Lible and Slander §288 Footnote 2 and the cases cited therein) Certainly the defense attempted to show on behalf of Barnett, and in accord with the other issues relating to immunity, that the State's Attorney had probable cause and was acting in a justifiable and approved manner in doing what he did within the scope of his judicial or quasi-judicial function as a prosecutor.

The abundance of evidence introduced without objection, in the course of direct examination of the defendant Barnett, and also introduced in response to questions of the plaintiff's counsel in cross-examination, states clearly the privileged occasion, namely the circumstances under which the defamatory language as alleged, was used. Again, the facts demonstrating clearly the existance of the privilege and the issues and facts supporting it as a defense. (See Flowers v. Zayre Corp., supra.)

Certainly, the answers to questions of plaintiff's counsel from defendant Craig and defendant Barnett—an attempt by plaintiff's counsel to establish an allegation of malice on the part of these defendants, brought unobjected responses which showed clearly that both Craig and Barnett were interested in the welfare of the plaintiff individually, and in the welfare of the people within their jurisdiction and control consistent with the nature and extent of their respective authority and their functions as educator and chief disciplinarian, on the one hand, and as State's Attorney on the other. (See Arkla Exploration Co. v. Boren, 411 F. 2d 879, C. A.8th 1969).

Counsel for the plaintiff admit in their brief at page 19, they were under the impression that Barnett's testimony had defeated his claim to immunity - and that the legal issues presented by the defense of prosecutorial immunity differed markedly from those of privilege. Certainly they cannot now be heard to argue that the evidence in support of privilege which was clearly introduced cannot be used to support that defense, a defense as they see it quite different from that of immunity itself.

The Court itself was quite concerned with the aspect of good faith, and clearly had bad faith been shown by plaintiff's counsel in cross-examination of the defendants Craig and Barnett actual malice would have been found by the Court (See the Court's Opinion Page 35 et. sec.; and Goforth v. Avemco Life Insurance Company 368 F. 2d 25 at Page 31 1966).

Although referred to earlier and quite briefly, the Court must have clearly had in mind in the exercise of its discretionary function and the inclusion of the additional defense of privilege, whether in fact the plaintiff would suffer any prejudice as a result of its amendment. Needless to say, and as recognized by the plaintiff in his brief, the decision whether the issue has been tried by implied consent is a matter for the trial court's

discretion—should not be reversed except upon a showing of abuse - arguably quite absent here. (See Hargrave v. Welman 276 F. 2d 948, C. A. 9th 1960), and (6 Wright and Miller §1493 at Page 469).

In support of its contention that it has been prejudiced, the plaintiff appellant indicates that he would have called additional witnesses. On the one hand, Lieutenant Killay's State Police report is self-explanatory. In addition, as counsel for the defendant Barnett indicated to both of plaintiff's counsel after the introduction of that report, Lieutenant Killay had just returned from an intensive training course at the United States Army Special Ordinance Center at Fort Gordon, Georgia - for State Police Lab Officers, just prior to the drafting of that single report. His testimony would have been much more beneficial to the defendant Barnett on the issue of concern and fear for the safety of others consistent with the invocation of the defense of privilege, than to the plaintiff on some theory of inconsistency in testimony allegedly for the purpose of showing malice on the part of the State's Attorney. It is important to bear in mind, that the plaintiffs had already extensively deposed the defendant Barnett (a deposition lasting two days) and had likewise deposed Dr. Craig. With respect to the issue of the state of anxiety at the campus, Dr. Craig did testify on that and the Court obviously accepted that testimony. Additionally, Barnett was acting on other information from a variety of sources to support his belief that the campus was in a state of anxiety and unrest as a result, at least partially, of the actions of the plaintiff Breakstone.

II

The District Court clearly did not err in holding that the defendant Barnett was inter alia, absolutely privileged as a matter of defense, in connection with the charge of libel by the plaintiff appellant.

The appellant having almost immediately before this point in his own

brief, having indicated to us that the legal issues presented by the defense of prosecutorial immunity are so drastically different from those of privilege, now maintains that the line between the absolute immunity of a defendant such as Barnett, and the absolute privilege in the context of a libel action (tort liability) is exceedingly fine. As we have indicated earlier in our brief, we feel that the line between the two is clear enough particularly when viewed in light of the evidence introduced and capable of being marshaled for one or the other issue in support of the defendants' additional defense of privilege.

There appears to be some mutuality of rationale in the area of immunity (or arguably privileged) for actions not clearly outside the scope of the prosecuting attorney's jurisdiction, (See Kauffman v. Moss 420 F. 2d 1270, C. A. Ta. 1970, Cert. Denied 91 S. Ct. 93, 400 U. S. 846), however, in connection with the defense of immunity, it must be realized that the immunity of such a quasi-judicial officer derives from the fact that they exercise a discretion similar to that exercised by judges,and that in addition to the relevance of the issue or facts of good faith, probable cause is also an important factor. (See Wilhelm v. Turner 431 F. 2d 177, C. A. Iowa 1970, cert. denied 91 S. Ct. 919, 401 U. S. 947; and McCray v. State of Maryland 456 F. 2d 1 C. A. MD 1972).

As indicated earlier, in order for the defense of absolute privilege to be available, the communication must be made on a privileged occasion. The actual circumstances under which the defamatory language as alleged, is used, are the occasion and it is that occasion which is privileged. The intent and purpose of the privilege as a matter of public policy, is not so much for the protection of those engaged in the public service or in the administration of law such as the defendant herein, as for the promotion of the public welfare - encouraging free and untremeled exercise of speech and

comment without the risk of an action allowing money damages for recovery. (See 50 Am. Jur. 2d Libel and Slander §193) It is clear that the thrust of the absolute privilege is the primacy of public concern - consideration for the general welfare, a purpose and aim, if not an end that the defendant Barnett had continually in mind throughout the course of the privileged occasion in question in the instant case.

The question of whether or not the subject of the communication by the defendant is or is not related to matters within the defendant's competency is surely ripe for argument by the plaintiff - and it is clear from the transcript that the plaintiff's counsel attempted to get the defendant Barnett to admit that the concerns that he had were outside the scope of his function - which he did not do. (See Tr. 177, 178 et. sec.) Certainly the test of privilege under this criteria, that applied by Judge Coffrin, is consistent with the Barr case (Barr v. Matteo 360 U. S. 564, 1959) and the test of the relationship between the act or conduct complained of and the matters committed to Barnett's control and supervision. The Court in its opinion, considered at great length the duties of the State's Attorney both express and implied, and in partial reliance upon an earlier opinion of the Attorney General of the State of Vermont, and also considering the present melieu and the atmosphere prevelant at the time of the facts in this case, rightfully concluded that "it would be most difficult to argue that in contemporary society crime prevention, protection of the citizenry from criminally induced harm, and control of potentially dangerous situations are outside of the purview of the office of State's Attorney - even though such activities are not directly involved with the prosecution of criminal offenses nor specifically enumerated by statute." (Opinion Page 33)

Arguendo, the duties of the prosecutor are chiefly to prosecute - and clearly there is immunity as well as privilege in connection with the performance

of these duties. The Polidor case (Polidor v. Mahady 130 Vt. 173, 287 A. 2d 841, 1972) cited by the plaintiff's counsel in its brief does not in any way detract from the basic principals enunciated by Judge Coffrin in his opinion. In fact, the case clearly demonstrates that the shadow of immunity affords its protection to persons such as the defendant unless and until they are acting "clearly beyond the reach of their office and jurisdiction". As the case holds in the segments cited by the plaintiff in its appeal, even excesses of jurisdiction are not without more "clearly outside" the jurisdiction of a prosecutor to the extent that immunity or privilege would be endangered.

To argue that a statement was beyond the scope of judicial or quasi-judicial function and duty, because it did not directly connect with a pending judicial proceeding certainly provides a position capable of easy assault. Again it is relevant and most important to consider the relationship - the reliance, that defendant Barnett placed in and upon defendant Craig and the purpose which flowed from that reliance for the unsolicited comment contained in the letter in question. Barnett himself admitted that the school was in the prime position (through Dr. Craig) to take immediate remedial action with respect to activities of the plaintiff with a view to protecting the College "public" interest having always in mind the greater interest of the community at large. Indeed it is the very community at large that formed the nucleus of concern for the State's Attorney and provided the primary motive or purpose by which the defendant Barnett apparently was inspired.

Surely it is for the Court as the trier of fact and law in this case, to decide, based upon the facts, whether the privileged occasion in factexisted. The Court's holding and opinion are amply supported by the evidence issued by the Court in its opinion and should not be set aside. Even if

arguendo, it were to be held that the application of the doctrine of absolute privilege had in this case escaped the confine or narrow limits that the Courts have applied to it, surely it can even be more vehemently argued and maintained that the basic public policy argument upon which privilege is based must find application in this new situation as outlined by the Court, based upon a review of the implied authority of the State's Attorney. (See 50 Am. Jur. 2d §194 Libel and Slander) The authority cited by the plaintiff appellant for the proposition that the doctrine espoused by Judge Coffrin has no precedent in the law of absolute immunity or privilege (§585 of the Restatement of Torts) seems at odds with a statement contained within the comments to §585 of the restatement itself. It seems clear from a reading of the comments in their entirety, that certainly the defamatory matter need not necessarily be relevant or pertinent to any issue before the Court in a judicial proceeding in order for there to be immunity or privilege, but rather that it merely have only some reference to the judicial function involved and when viewed from the negative, not be an action which does not have any conceivable reference to the performance of judicial duties or function. Even mere personal indiscretion or personal antagonism would not be sufficient to deprive an individual of the privilege or immunity (See comment E to §585 Restatement of Torts).

III

In addition, or in the alternative, the defendant Barnett was clearly protected by a conditional or qualified privilege with respect to statements contained in his letters to Dr. Craig.

A

INTRODUCTION

It is posited that the qualified or conditional privileged communication is one that is (one) made in good faith, (two) on any subject matter

in which the defendant Barnett has an interest, or in reference to which he has a right or duty, (three) if made to a person (such as Dr. Craig) having a corresponding interest or duty, (four) on a privileged occasion, and (five) in a manner and under circumstances fairly warranted by the occasion and duty, right, or interest. (See 29 Alr. 3d 961, and 50 Am. Jur. 2d Libel and Slander §195)

Similar to the absolute privilege, the qualified or conditional privilege arises from the need for full and unrestricted communication concerning a matter in which parties have either an interest or a duty.

It is universally recognized as essential, that in order to give rise to the defense of conditional privilege that the communication must be made on a privileged occasion, for the privilege attaches to the occasion itself (as previously indicated) rather than to the actual communication. Again the prevailing interest is that of the common convenience and welfare (including safety) of society and certainly it is not an area where a clearly defined line can be drawn with precision separating the privilege from the non-privileged occasion. Again it is the occasion and circumstances under which a communication is made which determines whether it is privileged. Where as here, there is certainly an absence of any material dispute as to the facts, the question as to the existance of the privileged occasion is one of law for the court, as is the question of abuse of the privileged occasion (and the burden for establishing such abuse being on the plaintiff herein). (See generally 50 Am. Jur. 2d Libel and Slander §196).

As indicated, there is a requirement of good faith - or in the negative the absence of malice.

While the question relating to whether the publication was privileged (either absolutely or conditionally) is generally considered to be one of law for the Court's determination, except in those cases (such as the one at hand)

where thereis a dispute as to the evidence, in such cases question of the status of the publication as privileged or not becomes a mixed question of law and fact to be determined by the trier of fact. For purposes of appeal then, quite clearly, if there is any evidence to support the decision below the opinion of the court must be upheld. Additionally, in the event that the trier finds the existence of the conditional privilege, such as in our case, is then the function of the trier of fact to determine whether or not there was an abuse of the occasion. (See generally 50 Am. Jur. 2d Libel and Slander §200) Thus, the scope of review, if anything, is narrower than as proposed by the plaintiff appellant.

B

IT IS CLEAR THAT THE CHARACTERIZATIONS OF THE DEFENDANT BARNETT IN HIS LETTERS TO DEFENDANT CRAIG WERE PRIVILEGED INTER ALIA, ON THE GROUND OF CORRESPONDING (COMMON) INTEREST OR DUTY.

Certainly the corresponding interest or duty of defendant Craig in connection with the privileged occasion, would be in the safety and welfare of the entire student body at Johnson State College, and also a concern which Dr. Craig expressed in his testimony for the individual welfare - not merely scholastic, but psychological as well, of the plaintiff vis-a-vis the explosive situation created by the plaintiff in his actions which culminated in the confrontation of December of 1970. The president of the College had earlier required of Barnett evidence of the potentially harmful nature of the device, and because of the absence of a lab expert, only preliminary findings were available until after the 1st of February 1971. Needless to say, Barnett's chief concern was the same i.e. the welfare of the people in the community and at the College, and when viewed in the perspective of information which Barnett had at his disposal indicating what he believed to be an instability in the character or psychological makeup of the plaintiff, it created all the

greater concern in his mind for the explosive device and its chief fabricator.

The question is not whether the common interest necessarily existed in Breakstone's mental health or psychological well-being, although the evidence is clear from the testimony of both Dr. Craig and Mr. Barnett that they did have that common interest, but rather whether there existed a common interest in the overall setting and the overall concern for public health and welfare on the campus and in the community at large.

Defendant Craig was most interested in obtaining information with respect to the potentially harmful nature of the device. What could be more clearly of common interest with respect to determining the potentially harmful nature of such a device, than to provide insofar as possible the results of information and/or evaluation relating to the personal opinion of defendant Barnett respecting the mental stability of the chief fabricator and possessor of the device. Certainly a device otherwise potentially harmful would be less potentially harmful in the hands or under the control and possession of one licensed and authorized to use such explosive devices in connection with business pursuits. Surely, the opinion solicited by the president left ample room for the observation of the State's Attorney - which opinion he felt he had to give to make the report a complete one, and in the State's Attorney's own mind to fully answer the question as posed by the College president i.e. whether and to what extent the device was potentially harmful to persons or property. Again, the question is one of necessity for reference and limited as the characterization by Barnett was in its scope i.e. to the particular incident involving the explosive device, its relationship and relevancy cannot be denied.

The general guiding principles cannot, of course, constitute an all-inclusive category of situations in which communications may be made to protect the public's interest or the interest of the residents at the College as

a so-called third person. But certainly the College and the community at large would classify as "other groups of persons to whom the standards of the community justify defamatory publications when their own legally protected interests or those of other persons are or reasonably appear to be endangered" as they were in this particular setting. (See Restatement of Torts §595 and the comments thereto)

Additionally, Section 598 of the Restatement seems to provide quite concisely the basic rationale for the Court's holding on the privileged nature of the occasion in view of the circumstances which existed at the time, which induced in the mind of the defendant Barnett a reasonable belief that the facts existed which affected or could affect a sufficiently important public interest (public welfare, fear of personal injury, etc.) and, the public interest as indicated previously required and in fact mandated the communication of the observation with respect to psychological makeup of the plaintiff to the president of the largest educational institution in the defendant's county - and the individual at that institution who was authorized and privileged to act on receipt of the information which had been previously requested. It certainly can also be argued that the communication was one as between two public officials, and president Craig being the representative of the State of Vermont for the educational institutional purposes in Lamoille County.

C

THE EVIDENCE DOES NOT DISCLOSE ANY ABUSE OF THE PRIVILEGE BY THE DEFENDANT BARNETT.

As indicated earlier, the requirement of good faith is a necessary preliminary to the finding of the immunity or privilege in question here. Good faith as indicated previously has been generally held to mean a freedom

from actual malice, actual malice being equal to a finding of bad faith. (See Goforth v. Avemco Life Insurance Co. supra. at page 31) When looking at the bona fides of the communication, the motive or purpose is important - and it seems clear here, above all else, that the purpose of the defendant Barnett was, in furthering an interest (protection of life and property) entitled to the protection of the privilege. The findings of the Court are clearly supported by the transcript and they are, that ill will and/or reckless action was completely absent. Certainly the question of good faith is a question of fact for the trier of fact and again if there is any reasonable evidence to support it it must be sustained on appeal. There is more than ample evidence to support those findings here. (See 50 Am. Jur. 2d Lible and Slander §197) The testimony is clear that Barnett was very concerned with the psychological well-being of the plaintiff as well as the physical well-being of the community, and that his actions were directed to those ends. The test is not one of good faith in fact, but rather than of subjective good faith and in order to be privileged, the publication must have been made in the honest belief of its truth or on bases that would not provide reasonable grounds for defendant to believe that the alleged defamatory matter was true. The conscious falsehood is what is not protected and that is the standard for inclusion and exclusion by privilege. (See Restatement of Torts §600 and 601) The trier of fact had the best opportunity to observe the character and demeanor of the witness on the stand, and to test for itself the bona fides of the assertions as to knowledge (actual or supposed) and reasonableness of belief from the subjective point of view. The reasonable ground necessary for the belief as referred to in Section 601 of the Restatement of Torts, are clearly present here and consist in part of the impressions gained by the defendant Barnett during the course of the full scale investigation at the college; the statements and reports of the investigating officers in

connection with that investigation; the personal fears of bodily harm conveyed to the State's Attorney by two of the individuals closely involved; and peripheral matters brought to the State's Attorney's attention in connection with the drug rehabilitation programs and measures which the State's Attorney had implemented in Lamoille County. (See generally 50 Am. Jur. 2d Lible and Slander and footnotes thereto)

There is authority to the effect that one who makes defamatory imputations on a privileged occasions may be held lible for damages only if it is shown that he acted with actual malice. (50 Am. Jur. 2d Lible and Slander §278)

The evidence is likewise clear that the plaintiff was the primary fabracator of the device, and that he accepted primary responsibility for its construction as well as its ownership immediately after its discovery.

The argument that we can equate bombs with firearms somehow falls short of the potential harm and psychological affect created by each - particularly in troubled campus situations.

It seems clear to us, that the facts mustered by the plaintiff in his brief amply support the reasonable belief basis required of the defendant in connection with the conferring of the privilege invoked.

D

THE COURT CORRECTLY CONSIDERED AND EVALUATED THE EVIDENCE RELATING TO THE LACK OF"ACTUAL MALICE" WHICH CHARACTERIZE THE ACTIVITIES OF THE DEFENDANT BARNETT.

The burden, of course, with respect to the issue of malice is on the plaintiff to demonstrate that the privilege is not applicable. Despite the two days of deposition with the defendant, and the constant attempts during cross-examination to establish malicious motive or reckless and wanton disregard of the plaintiff's rights, the plaintiff's counsel was not able to

shake the good faith conviction and reasonableness of the actions of the State's Attorney.

Arguendo, no remedy could be had as against the defendant Barnett under the doctrine of absolute privilege even though the statements may have been made maliciously. (See 50 Am. Jur. 2d Lible and Slander §193 Note 14, and §199)

To inferentially find the necessary malice, there must be such a gross disregard for the rights of the person injured as is equivalent to malice in fact.

The standard enunciated in Vermont most recently, (Michlin v. Roberts, Docket No. 12-73, October Term 1973 Vermont Supreme Court) while narrowly defining the standard of recklessness required as a prerequisite to finding of liability in a "media libel", and therefore substantially limiting the holding of Lancour v. Harold and Globe Association (112 Vt. 471, 28 A. 2d 396, 1942) does seem to clearly show that the equivalent of actual malice is defined as the making of a statement with reckless disregard as to whether or not it was false when made. (See Michlin at Page 8) The burden would then be upon the plaintiff in this case to demonstrate that the defendant entertained serious doubts to the truth of his opinions or observations.

Certainly the Court did take into account the age and experience of the prosecutor in question in passing on the standard of good faith and the lack of malice-in fact or implied. As the transcript clearly demonstrates, the Court had in mind the testimony of the defendant (Tr. 184 and 186) that the State's Attorney had only been in the active practice of law for approximately two years. That the formal education as a prosecutor consisted in participating in two seminar type courses. Also, the very nature of the transmission to the defendant Craig marked as it was personal, indicated the

concern of the State's Attorney that only that individual who was in the best position to evaluate and monitor the plaintiff's problems was advised of the State's Attorneys official opinion with respect to them.

As the Court indicated at Page 36 of its Opinion, the evidence did not disclose any intent or purpose to damage the plaintiff's reputation or standing in the community. Defendant Barnett was very legitimately concerned with the nature of the conduct which had been exhibited by the plaintiff and these concerns were given with anything but "reckless and wanton disregard of the plaintiff's rights". Certainly the evidence from the transcript afforded the Judge with the opportunity to draw but one inference - reasonably that is, from the evidence. That is the inference that the Court drew. Certainly it is within the power and discretion of the Court as the trier of fact in this case to do that. It is also within his competence and jurisdiction as the trier of the law. (See 50 Am. Jur. 2d Lible and Slander §199)

It is thus clear, that the Court's entire discussion and opinion is filled with references to not only subjective intent, but directed toward a searching inquiry of the evidence for purposes of determining whether or not the plaintiff actually sustained the burden of demonstrating evidence sufficient to form an inferential basis for the conclusion of "reckless and wanton disregard of the plaintiff's rights" with respect to statements made and claimed to be privileged. In any event, the finding of the Court with respect to qualified privilege is not absolutely essential to the defendant Barnett's case, as the issue of absolute privilege is amply supported by the evidence and would justify the Court's conclusion on its own.

E

THE COURT'S FINDING THAT THE APPELLANT DID NOT SUSTAIN HIS BURDEN OF PROVING MALICE IS CLEARLY SUPPORTED BY THE EVIDENCE, AND IN FACT THERE IS NOT THE LEAST SCINTILLA OF EVIDENCE THAT THE NECESSARY MALICE WITH RESPECT TO THE

ISSUE OF QUALIFIED PRIVILEGE IS EVEN PRESENT.

It is expected that the factual arguments asserted by the plaintiff in Section E of Part V have already been amply treated. Suffice it to say, that as previously indicated, the concurrent goal of the State's Attorney was the safety of the community - and the safety of the individual from himself by what he felt was a course of professional consultation or treatment. Psychiatric counseling which he recommended based on his opinion of the stability of the plaintiff must be viewed in terms of his overall concern for the community of citizenry in the community of students at large. It is indeed grasping beyond the reach of the permissable evidentiary inferences, to maintain that the evidence discloses a pattern of intentional prosecution in this case. The infectious paranoia which sought redress in the course of the depositions and in this case must again go unsatisfied - from the point of view of legal treatment at least.

CONCLUSION

FOR THE REASONS SET FORTH ABOVE THE APPELLANT BARNETT RESPECTFULLY SUBMITS THAT THE JUDGMENT AND OPINION OF THE DISTRICT COURT FOR THE DISTRICT OF VERMONT SHOULD BE AFFIRMED IN ALL RESPECTS.

Respectfully submitted
for the defendant Theodore Barnett,
individually, and as State's Attorney
for Lamoille County

David L. Cleary, Esquire
for Richard E. Davis Associates, Inc.